168

(1)

Supreme Court, U.S.
FILED

No. 10-199

AUG 03 2010

OFFICE OF THE CLERK

In the

Supreme Court of the United States

VALERIE T. FILAR,

Petitioner,

v.

CHICAGO SCHOOL REFORM BOARD OF TRUSTEES, a/k/a BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD T. MCCAULLEY, JR.
Counsel of Record
ROPES & GRAY LLP
111 S. Wacker Drive
46th Floor
Chicago, IL 60606
(312) 845-1200
richard.mccaulley@ropesgray.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The courts of appeals are divided as to whether, when excluding evidence pursuant to Fed. R. Evid. 403, a court should provide a basis for its ruling – which would allow for meaningful appellate review. The issues presented here are:

1. When a district court excludes evidence pursuant to Fed. R. Evid. 403 should the court explain the basis for the ruling so that there is an opportunity for meaningful appellate review?

2. Does due process require that there be support in the record for the district court's exclusion of evidence pursuant to Fed. R. Evid. 403?

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioner is Valerie T. Filar. Petitioner was the plaintiff-appellant in the United States Court of Appeals for the Seventh Circuit. Respondent is Chicago School Reform Board of Trustees, also known as Board of Education of the City of Chicago. Respondent was the defendant-appellee in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING BELOW	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT	2
A. Facts Giving Rise to the Case	2
1. Valerie T. Filar's Employment at Foreman High School	2
2. Filar's Displacement from Foreman in 1999	2
3. Filar's Displacement in 1993, and Results of Her Grievance	3
4. The District Court Excluded Evidence of the 1993 Displacement	3
B. The Proceedings Below	5
REASONS FOR GRANTING THE PETITION	5
I. There Is a Direct Conflict Amongst the Circuit Court Decisions Regarding Whether Or Not a Trial Court Must Articulate the Reasons for Exercising Discretion	5

TABLE OF CONTENTS – Continued

Page

II. Articulation of Reasons for the Exclusion of Evidence Pursuant To Fed. R. Evid. 403 Is an Important Issue for All Litigants in Federal Courts, and This Court Should Address the Need for the Court to Articulate the Reasons for Excluding Evidence 8

III. The District Court in This Case Excluded Critical Evidence From the Case Without Explaining the Basis on Which Discretion Was Exercised, and Based on an Incomplete Record 9

CONCLUSION 18

APPENDIX

May 10, 2010 Opinion of the United States Court of Appeals for the Seventh Circuit ..... App. 1

May 10, 2010 Entry of Final Judgment ..... App. 9

May 11, 2009 Jury Verdict Judgment ..... App. 11

May 22, 2008 Opinion of the United States Court of Appeals for the Seventh Circuit ..... App. 12

January 5, 2007 Opinion of the United States District Court, N.D. Illinois, Eastern Division ..... App. 43

Portions of the Trial Record ..... App. 60

TABLE OF AUTHORITIES

Page

CASES

Leopold v. Baccarat, Inc., 174 F.3d 261 (2d Cir. 1999) 6

State v. Ferranto, 112 Ohio St. 667 (1925) 8

United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) 6

United States v. Johnson, 388 F.3d 96 (3d Cir. 2004) 7

STATUTES

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

Fed. R. Evid. 401 ..... 4, 12

Fed. R. Evid. 402 ..... 4, 12

Fed. R. Evid. 403 ..... 8, 9, 12, 16

PETITION FOR WRIT OF CERTIORARI

Petitioner Valerie T. Filar respectfully seeks a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit are reported at No. 09-2489, 2010 WL 1872711 (App. 1a-8a) and 526 F.3d 1054 (App. 12a-42a). The opinion of the United States District Court for the Northern District of Illinois is reported at No. 04-4679, 2007 WL 79290 (App. 43a-59a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT

A. Facts Giving Rise to the Case

This case involves the displacement of a teacher, Valerie Filar, from the Chicago Public Schools.

1. Valerie T. Filar's Employment at Foreman High School

Ms. Filar was born in Poland on January 10, 1930. She received her bachelor's degree in General Studies with a concentration in Computers in 1990 from Roosevelt University and transitional teaching certificate in 1991. Filar was hired as a teacher at Foreman High School from the Fall of 1992 until September 27, 1999. Dr. John Garvey was the principal at Foreman that entire time, and made the decision to hire Filar. Garvey was generally responsible for staffing at Foreman and for assessing the employment records of the teachers in the school. Filar taught in the Polish bilingual education program at Foreman.

2. Filar's Displacement from Foreman in 1999

On September 17 and 27 of 1999 (shortly after classes had resumed for the 1999-2000 school year),

Filar was informed by Garvey that she was being displaced from Foreman. The decision to displace Filar was made solely by Garvey.

3. Filar's Displacement in 1993, and Results of Her Grievance

Garvey testified at trial that when he hired Filar in 1992 there was an "acute" need for Polish bilingual teachers. Garvey also testified that at the time he hired Filar in 1992 he was "desperate" to hire Polish bilingual teachers for Foreman.

At the beginning of the 1993 school year, about one year after he had hired Filar, Garvey displaced her. Filar immediately filed a grievance concerning her displacement. While the Board decided whether her displacement was proper, in the spring of 1994, Garvey hired two younger teachers to replace Filar. The Board determined in 1994 that Garvey's decision to displace Filar was improper, and ordered her to be reinstated.

4. The District Court Excluded Evidence of the 1993 Displacement

The district court precluded Filar from introducing evidence that Garvey displaced Ms. Filar in 1993 without articulating the reasons for exercising its discretion to exclude the evidence:

> THE COURT: As I see it that would be a case within a case to determine those issues

> as to 1999. It would be almost like a trial dealing with the 1993 matters, lifting that mini trial, so to speak, into this case filed in 2004. It is also remote. It is, at least according to your statements here, about six years earlier.
>
> And so the probative value is substantially outweighed by the danger of unfair prejudice, the confusion of the issues, calling of additional witnesses, additional presentation of documents and related matters, but summarily it would be a mini trial on what occurred in 1993.
>
> So it is – if it may be relevant in terms of Rule 401 and 402, in the exercise of my discretion with the application of Rule 403, I would exclude the evidence of the so-called 1993 displacement and grievance issue.

App. 62a-63a.

If allowed at trial, this evidence would have established that despite the fact that Dr. Garvey hired Filar when she was in her 60's, he immediately tried to displace her from Foreman. Garvey admitted during trial that he hired Filar when there was an emergency need for teachers, however, Filar was precluded from introducing evidence that Garvey almost immediately sought younger teachers to replace her. This evidentiary ruling allowed the Chicago Board of Education to argue that Garvey did not discriminate on the basis of age because he hired Filar when she

was in her 60's and retained her for 7 years. The 1993 displacement is evidence of discriminatory intent.

B. The Proceedings Below

The district court entered summary judgment against the plaintiff. Plaintiff appealed that judgment, and the Seventh Circuit Court reversed and remanded. The jury returned a verdict in favor of the Defendant.

REASONS FOR GRANTING THE PETITION

I. There Is a Direct Conflict Amongst the Circuit Court Decisions Regarding Whether Or Not a Trial Court Must Articulate the Reasons for Exercising Discretion

In the decision below, the circuit court tacitly approved the district court's exclusion of evidence without articulating the reasons for exercising that discretion. The law is clear that the decisions of a trial court to exclude evidence will not be disturbed unless it can be demonstrated that the district court abused its discretion in excluding the evidence. The law is also clear that appellate review of the trial court's decision is entitled to deference. Discretion is the power of a judge to use his or her own judgment in making decisions guided by what is fair and equitable and by principles of law.

Since the appellate court will give such deference to a decision as important as the exclusion of evidence that a party feels is important to his or her case, logic dictates that it must be incumbent upon the trial court to clearly articulate the reasons that such discretion was exercised in favor of excluding specific evidence, and that there must be some support in the record for those allegations. There is a split amongst the various circuit courts about whether or not a court needs to articulate the basis upon which it exercised its discretion to exclude evidence.

The Seventh Circuit at least tacitly recognizes that discretion must actually be exercised. *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir. 1987) ("Discretion, when exercised, will rarely be disturbed."). The court in *Beasley* went on to state that there was insufficient indicia in the record to indicate that the judge had actually considered the factors relevant to weighing exclusion of relevant evidence.

The Second Circuit has held that there is no need for the district court to articulate those reasons. *Leopold v. Baccarat, Inc.*, 174 F.3d 261, n.11 (2d Cir. 1999) ("Of course, the district court was not required to articulate the relevant considerations on the record; a simple 'sustained' or 'overruled' will ordinarily suffice. Our scrutiny of such an evidentiary ruling might be altered in the rare case where the record affirmatively reflects the trial court's failure to exercise its discretion properly."). The Second Circuit will not undertake an analysis of whether or not the court actually exercised discretion in deciding to

exclude evidence from the trial unless there is some indication in the record that the trial court failed to exercise discretion. Under this approach, discretion can be used synonymously with the word "caprice".

The Third Circuit has held that it is important for the district court to articulate the reasons that it exercised its discretion to exclude certain evidence, and that the ruling be supported by facts in the record. *United States v. Johnson*, 388 F.3d 96, 101 (3d Cir. 2004) ("Ordinarily we review an evidentiary ruling of a district court involving a balancing of interests for abuse of discretion, but if the district court does not articulate the reasons underlying its decision there is no way to review its exercise of discretion."). Under such circumstances, the Third Circuit will not defer the decision of the district court. Instead, the Third Circuit will attempt to reach an appropriate balance based on the record before it, or remand the case for further proceedings. *Id.* The Third Circuit test and process for evaluating such disputes actually requires that the district court demonstrate that it based the decision to exclude evidence on a reasoned and considered analysis of the record facts.

When evidence is excluded *in limine*, before the court has had the opportunity to provide complete context to the excluded evidence, the need for the court to demonstrate its thinking is especially important. Without a clear articulation of the reasons that discretion is being exercised, it is impossible to determine whether the court entered its ruling based on

what is fair and equitable and based upon principles of law. This Court should take this opportunity to clarify the district court's role in providing a concise statement of the reasons that discretion is being exercised to exclude evidence, and adopt the approach articulated by the Third Circuit.

II. Articulation of Reasons for the Exclusion of Evidence Pursuant To Fed. R. Evid. 403 Is an Important Issue for All Litigants in Federal Courts, and This Court Should Address the Need for the Court to Articulate the Reasons for Excluding Evidence

District courts routinely exercise discretion in excluding evidence at trial. As the Ohio Supreme Court stated in 1925, "[h]owever incapable of exact definition, it is clearly recognized that discretion is not absolutely without elements, conditions, or limitations. The term implies the absence of a hard and fast rule, yet it should not be another word for 'arbitrary will,' 'inconsistent action,' or 'unstable caprice.'" *State v. Ferranto*, 112 Ohio St. 667, 677 (1925). The term "abuse of discretion" has become viewed as a rubber stamp in the law, where district court decisions on exclusion of evidence are viewed as beyond the scope of legal review. In order to have meaningful appellate review of a district court's decision to exclude evidence from the trial the court must give an indication of how that discretion is being exercised. Discretion does not, and should not, mean arbitrary or capricious. Discretion requires a thoughtful application of

legal principles, and a decision that is appropriate to the facts of the case presented for review. Allowing a court to make a decision which will necessarily be deferred to at the appellate level **requires** a clear and cogent disclosure of the underpinnings of that decision. Furthermore, the review must be based on a record that supports the reasoning of the court.

Failure to provide clear rulings based on a complete record can lead to significant judicial abuse and a breakdown in due process by precluding meaningful appellate review of discretionary rulings. The legal community has come to view these discretionary rulings as a black hole that cannot be penetrated on appeal. District courts, absent a mandate from this Court, are free to cloak discretionary rulings from appellate review by summarily stating – even without hearing evidence on an *in limine* motion – that the evidence is excluded under Fed. R. Evid. 403. It is not an undue burden to have the court articulate the reasons that it has decided to exclude evidence that a party seeks to enter to support his or her case, and to make that ruling on a complete record.

III. The District Court in This Case Excluded Critical Evidence From the Case Without Explaining the Basis on Which Discretion Was Exercised, and Based on an Incomplete Record

The district court in this case excluded important evidence before the trial started. This case is about

age discrimination in the public schools. At the trial the defendant argued extensively that the person alleged to have discriminated against the plaintiff, Principal Garvey, did not discriminate because both the plaintiff and Garvey were "old" when he hired her. This argument was made to lead the jury to conclude that if Garvey did not want to have old people working in his school he would have never hired her in the first place. Two points effectively rebutted this argument. (1) Garvey hired plaintiff when there was an "emergency" in his school, and he was in a crisis because he lacked Polish speaking teachers, and (2) he displaced her from the school less than one year after he hired her only to have his decision overturned by the Board of Education. The district court excluded this evidence based on an exercise of its discretion without explaining its reasoning:

> MS. HOGAN: The next issue is our motion to bar evidence of a 1993 displacement and grievance that Miss Filar filed and that was actually six years prior to the displacement that occurred. "Displacement" means just basically being shut out of your job at the high school and you move into a substitute pool. It's not a firing. This happened to her in 1993 as well at Foreman High School. It is not related to this instance. There is no evidence of age discrimination. It was a contractual issue. The board – Dr. Garvey and the union disputed it and the board ruled in Miss Filar's favor.

THE COURT: Did the plaintiff intend to get into that, the 1993 displacement and grievance issue?

MR. MCCAULLEY: Yes, your Honor.

THE COURT: What is the date of the ultimate termination or displacement in this case?

MS. HOGAN: September 19th, 1999

THE COURT: So this event occurred six years before that time?

MS. HOGAN: That's correct.

MR. MCCAULLEY: Your Honor, it is, however, related to the events that led up to the termination in 1999.

In the 1993 school year Dr. Garvey displaced Miss Filar saying that he didn't have any position for her. Later in the spring, after she filed a grievance, the board ultimately determined that Dr. Garvey did have a position open and filled it with one of the comparators in the 1999 case. So it is part of what the plaintiff will offer as a pattern or related pattern. And the fact that this teacher was appointed or put in as an FTB to replace the plaintiff in that time frame and was much, much younger, some 25 years younger, is highly relevant to the case and we do intend to –

THE COURT: As I see it that would be a case within a case to determine those issues as to 1999. It would be almost like a trial

> dealing with the 1993 matters, lifting that mini trial, so to speak, into this case filed in 2004. It is also remote. It is, at least according to your statements here, about six years earlier.
>
> And so the probative value is substantially outweighed by the danger of unfair prejudice, the confusion of the issues, calling of additional witnesses, additional presentation of documents and related matters, but summarily it would be a mini trial on what occurred in 1993.
>
> So it is – if it may be relevant in terms of Rule 401 and 402, in the exercise of my discretion with the application of Rule 403, I would exclude the evidence of the so-called 1993 displacement and grievance issue.

(Tr. 10-12) (App. 61a-63a). The district court cut off counsel's argument concerning the point, and provided a summary recitation of the factors identified in Fed. R. Evid. 403. There was simply no basis in the record, especially at that early stage of the proceedings, to support the court's conclusions.

The excluded evidence was an effective rebuttal to the Board's evidence and would have shown an intent to discriminate on the basis of age. The Board made the fact that Garvey hired Filar the centerpiece of its evidence and arguments about why the jury should not find that Garvey discriminated on the basis of age. During the opening statement counsel

for the Board made a point of indicating that Garvey hired Filar when she was 62 years old:

> In fact, the evidence will show that Dr. Garvey hired Miss Filar when she was 62 years old. Miss Filar only had a few months of substitute teaching experience at the time and teaching was her second career.

(Tr. 127) (App. 64a).

In closing argument, counsel for the Board argued that the fact that Garvey hired Filar when she was 62 was a central piece of evidence in the Board's favor:

> Let's start with Miss Filar. Well, first the most obvious point is that Dr. Garvey hired Miss Filar in 1992 at age 62 – I'm sorry – yeah, 1992 – too many dates in this case – at age 62.
>
> He hired her after an in-person interview.
>
> It doesn't make sense to say that someone who would hire a woman who was age 62 would suddenly, in 1999, turn around and become discriminatory based on age; would suddenly develop an age bias within seven years. That doesn't make sense.

(Tr. 592) (App. 65a). In precluding Filar from presenting evidence that Garvey displaced Filar after one year and replaced her with younger teachers the district court allowed the Board to make these arguments unhindered. No reasonable person, in light of

this evidence and the arguments advanced by the Board, could conclude that it was proper to preclude Filar from entering this evidence.

Ms. Filar was hired to teach computers at Foreman in 1992. Garvey testified at trial that there was an "acute" need for teachers in that school year in the Polish bilingual program, and that he desperately needed such teachers (Tr. 134; 144).

There is no dispute that in 1993, less than one year after Garvey hired Ms. Filar, he displaced her from Foreman. Filar filed a grievance with the Board asking that she be reinstated to Foreman because her displacement was improper. The Board ultimately determined that Garvey's attempt to displace Ms. Filar was improper, and she was reinstated to Foreman. When she returned to Foreman she learned that two other younger teachers had been hired in her absence – Piotr Monaco and Kornelia Rydberg. At least one of those teachers – Kornelia Rydberg – was teaching computer classes in the Polish bilingual program (Tr. 143).

The jury heard voluminous evidence concerning these other younger teachers at trial. The jury did not hear, however, that Garvey improperly displaced Filar soon after she was hired.[1] The jury did not hear

---

[1] In typical circumstances a relatively short time period between the hiring and firing of an older worker is **not** evidence of discrimination. (App. 34a). However, the facts and circumstances of this case compel the conclusion that the displacement

(Continued on following page)

that the Board overruled Garvey and ordered that Ms. Filar be reinstated at Foreman. The jury did not hear that after displacing Ms. Filar because there was no position for her – he almost immediately went out and hired two younger teachers to fill spots in the Polish bilingual program. The Board would not have been able to argue that the jury could rely on the fact that Garvey hired Filar when she was 62 as evidence that he did not discriminate on the basis of her age.

If this evidence had been allowed in by the district court, Filar could have rebutted the Board's argument that Garvey hired Filar when she was old. She could have argued to the jury that Garvey hired her when he was in a time of crisis – any port in a storm so to speak – and then improperly cut her loose at the very first opportunity. And, soon after her departure due to his improper displacement, she was replaced by the younger teachers who received preferential treatment in the 1999 displacement. Ms. Filar was precluded from arguing that her displacement was a mere continuation of a discriminatory plan rather than a "hard choice" he was forced to make in 1999. The Board was allowed to argue that there could be no age discrimination in this case because Garvey hired Filar when she was 62 knowing that the

---

of Filar after one year, when she was hired to fill an emergency need, and was then replaced with younger workers, compels the conclusion that Garvey only hired her because he had to fill the spot, and immediately set about to replace her with a younger teacher. This establishes discriminatory intent.

jury could not be told that he tried to displace her less than a year later, and hired two younger teachers while her grievance was pending at the Board.

Although the district court refers in its ruling to Fed. R. Evid. 403, there are no reasons in its ruling articulating precisely how introducing evidence that Garvey displaced Filar in 1993 would cause confusion or result in burden on the judicial process. Furthermore, there was no evidence or record to support any of the conclusions that the district court apparently reached. As discussed above, since the Board chose to make the fact that Garvey hired Filar when she was 62 a central piece of evidence and argument to the jury, the probative value of Garvey's displacement of Filar less than a year later, and hiring younger teachers while she was pursuing her grievance, was extremely high. Furthermore, the fact that the Board ultimately determined that the displacement was improper also tends to prove that Garvey's actions in 1993 were improper and cast doubt on his credibility and truthfulness.

Furthermore, it is difficult to understand how the jury could be confused by the introduction of this evidence. Clearly the simple fact that the evidence related to events in 1993 was not a sufficient basis to conclude that the jury would be confused as the district court allowed evidence of evaluations from 1992 and beyond (even despite the fact that such evidence

contained an unexplained "gap" for the time period that Filar was pursuing her grievance).[2]

Since neither party indicated that any additional witnesses would be called this is not an issue that would have presented a significant burden on the management of the case or on the time of the district court or the jury. The district court simply did not want to hear the evidence, or even argument about why it should be admitted.

The district court abused its discretion in excluding the evidence of the 1993 displacement without any support in the record, and without articulating a reason for excluding the evidence. Had Filar been allowed to present that evidence, there is a significant chance that the jury could have concluded that Garvey only hired Filar because he desperately needed a teacher in the Polish bilingual program at Foreman, and then immediately tried to replace her with younger teachers – unsuccessfully in 1993, and successfully in 1999. As a result of the district court's ruling, Filar was deprived of her best evidence to counter the Board's inference that Garvey could not have discriminated against Filar because he hired

---

[2] The district court allowed, over objection, evidence of teacher evaluations for Filar that extended back to 1992. Of course, there was no evaluation in the records for the time period when Filar was displaced from the school in 1993. The district court let this evidence in and hoped that the jury would not notice. (Tr. 505).

her when she was 62 years old. Filar should be allowed a new trial to argue that point to the jury.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

RICHARD T. MCCAULLEY, JR.
Counsel of Record
ROPES & GRAY LLP
111 S. Wacker Drive
46th Floor
Chicago, IL 60606
(312) 845-1200
richard.mccaulley@ropesgray.com

Counsel for Petitioner

August 9, 2010

2010 WL 1872711

United States Court of Appeals,
Seventh Circuit.
Valerie T. FILAR, Plaintiff-Appellant,
v.
CHICAGO SCHOOL REFORM BOARD OF TRUSTEES, a/k/a Board of Education of the City of Chicago, Defendant-Appellee.
No. 09-2489.

Argued Jan. 21, 2010.
Decided May 10, 2010.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 04 cv 4679, Charles R. Norgle, Sr., Judge. Richard T. McCaulley, Attorney, Ropes & Gray, Chicago, IL, for Plaintiff-Appellant.

Linda Hogan, Lee A. Lowder, Attorneys, Chicago Board of Education Law Department, Chicago, IL, for Defendant-Appellee.

Before FRANK H. EASTERBROOK, Chief Judge, RICHARD D. CUDAHY, Circuit Judge and DANIEL A. MANION, Circuit Judge.

ORDER

Valerie Filar worked as a full-time substitute teacher in the Polish bilingual program at Foreman High School in Chicago. In 1999, the principal of the school re-classified her as a roving substitute. Believing that decision was because of her age, she sued the Chicago School Reform Board of Trustees

under the Age Discrimination in Employment Act. The case went to trial, and the jury returned a verdict for the Board. Filar appeals, claiming she is entitled to a new trial because the district court erred in ruling on three evidentiary matters. We affirm.

I.

In the fall of 1992, there was an acute need for Polish bilingual teachers at Foreman High School in Chicago. Dr. John Garvey, the principal at Foreman High, hired 62-year-old Valerie Filar to teach computer in the school's Polish bilingual education program. Filar was classified as a "full-time basis substitute" (FTB), a non-tenure-track instructor who teaches in a particular school for an entire school year. FTBs have less seniority than tenure-track "appointed" teachers, meaning that when teaching positions lose funding or are no longer needed, FTBs are "displaced" first. ("Displacement" means that a teacher is re-categorized as a roving "cadre substitute" who fills temporary vacancies in city schools as they arise.). And among FTBs with similar credentials, the least senior is the first to go.

One year later, Garvey displaced Filar. She grieved that decision to the Chicago Board of Education. While her grievance was under review, Garvey hired two FTB teachers for the Polish bilingual program – Piotr Monaco and Kornelia Rydberg – both of whom were younger than Filar. The Board

eventually reinstated Filar in August 1994 after concluding that her displacement was improper.

Over the next several years, Filar taught in a traditional classroom setting and received either "satisfactory" or "excellent" overall reviews from Garvey. Then, from 1997 to 1999, she supervised students in a computer lab where the instruction was computer-based; she received highest possible "superior" overall ratings for those two years. In contrast, Rydberg received all "superior" reviews and Monaco received all "superior" and one "satisfactory" from 1994 to 1999 while teaching in traditional classroom settings.

In the summer of 1999, Garvey appointed Rydberg and Monaco to tenure-track positions. Then, in September 1999, Garvey displaced Filar. She filed a grievance with the Board, alleging the displacement was improper because she was not the least senior FTB. The Board held a hearing concerning the grievance with Filar, two union representatives, and a hearing officer present. The Board eventually upheld the displacement after concluding that Filar was the least senior FTB in the Polish bilingual program.

In 2004, Filar sued the Board for violations of the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). The district court granted summary judgment for the Board on both claims. Filar appealed; we affirmed on the ADA claim but reversed on the ADEA claim. *Filar*

v. Board of Educ. of City of Chicago, 526 F.3d 1054 (7th Cir.2008). The district court then held a trial on the age discrimination claim. Filar attempted to prove that claim, at least in part, by showing that Garvey had appointed the younger comparators (Monaco and Rydberg) to tenure-track positions in the summer of 1999, leaving the older Filar as the only FTB in the Polish bilingual program and thus an easy target for displacement. During the trial, the district court excluded evidence of Filar's 1993 displacement and grievance under Federal Rule of Evidence 403 after concluding the probative value was substantially outweighed by the danger of unfair prejudice and potential confusion of the issues – or in its own words, because delving into such events would necessitate a "mini trial." The court also excluded evidence of the 1999 displacement hearing as hearsay and because the evidence would require a separate trial concerning that hearing. It did, however, permit Filar to introduce a document in which the Board, before officially denying her grievance, briefly mentioned the hearing. And over Filar's objection, the district court allowed the Board to introduce evidence of the comparators' and her performance evaluations dating back to 1992 and forbade Filar from discussing the gap in the evaluations that occurred due to her displacement in 1993-94. After the close of the evidence, the jury returned a verdict for the Board. Filar appeals, arguing she is entitled to a new trial based on the district court's allegedly improper rulings on the three aforementioned evidentiary issues.

II.

We first address Filar's contention that the district court wrongly excluded evidence of her 1993 displacement based upon Federal Rule of Evidence 403. Specifically, Filar claims that ruling permitted the Board to argue unhindered in its closing statement that because Garvey had hired her when she was 62-years-old in 1992, he was not discriminating against her because of her age when he displaced her in 1999. As with all of the district court's evidentiary rulings, our review is for an abuse of discretion, and we give special deference to the court's assessment of the balance between probative value and potential for unfair prejudice and confusion of the issues under Rule 403. *Thompson v. City of Chicago,* 472 F.3d 444, 453 (7th Cir.2006). We will reverse only if no reasonable person would agree with the trial court's decisions. *Maher v. City of Chicago,* 547 F.3d 817, 823 (7th Cir.2008).

According to Filar's offer of proof, she would have presented evidence that Garvey only hired her because Foreman High School was in a pinch for Polish bilingual teachers and that he displaced her a year later because the school's acute need for teachers had abated. She also would have shown that Garvey hired two younger FTB teachers while she pursued her grievance. In addition, Filar claims she would have shown that the Board eventually found her displacement to be improper and ordered her reinstated. As the district court fairly perceived, exploring and resolving all of these points from over

fifteen years earlier essentially would have required a trial-within-a-trial, which could have blurred the distinction between the key issues concerning the 1999 displacement and the collateral ones surrounding the 1993 displacement. The court concluded that the probative value – if any – of delving into the circumstances surrounding the 1993 displacement was substantially outweighed by the danger of confusing matters for the jury. This was a reasonable decision entitled to special deference on appeal.

Next, Filar contends that the district court abused its discretion in permitting the Board on the one hand to introduce evidence of her performance evaluations dating back to 1992 but at the same time precluding her from explaining that the absence of an evaluation for 1993 was due to the first displacement. She concedes that the last two evaluations before the 1999 displacement are relevant but argues that her earlier evaluations are irrelevant concerning whether Garvey discriminated against her on the basis of age. Her position is inconsistent, but not surprising: Filar received "superior" ratings the two years immediately preceding her 1999 displacement for her performance in a computer lab. However, she received lower marks in previous years when she was teaching in a traditional classroom setting. By comparison, Monaco and Rydberg, who regularly taught in traditional classrooms, received higher marks than Filar did when she was teaching in a similar traditional classroom. The Board understandably wished to use this evidence to show that Garvey had legitimate,

non-discriminatory reasons for promoting Monaco and Rydberg to tenure-track positions and passing over Filar. Thus, the evidence was probative of a determining fact in the case. Moreover, the district court's refusal to let Filar probe the gap in her ratings was consistent with its earlier ruling that evidence of the 1993 displacement should not be admitted. And there is no merit to Filar's argument that the gap was somehow prejudicial to her: the mere absence of an evaluation for one year would not create any unfavorable inference against her. The district court did not abuse its discretion on this issue.

Finally, Filar contends that the district court's exclusion of evidence concerning the 1999 grievance hearing was improper. Even assuming arguendo that is true, to obtain reversal Federal Rule of Civil Procedure 61 and Federal Rule of Evidence 103(a) require Filar to show that her substantial rights were affected. *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 630 (7th Cir.2008); *Cruz v. Town of Cicero*, 275 F.3d 579, 589 (7th Cir.2001). She cannot do this because the substance and significance of the excluded evidence is not reflected in the record.

After a district court has made a ruling excluding evidence, Federal Rule of Evidence 103(a)(2) requires that the substance of the evidence be made known by an offer of proof unless it is apparent from the context. That did not happen here. Instead, after the district court sustained the Board's objection to the line of questioning concerning the 1999 grievance hearing, Filar's counsel moved on, introducing the

letter from the Board denying Filar's grievance. Her counsel did not make an offer of proof regarding what the evidence of the hearing would have shown or how it was material. Nor is it apparent from the context. Before the Board objected, Filar had just begun testifying about the 1999 grievance hearing and the persons present. The district court could not discern from that snippet of testimony what transpired at the grievance hearing and what significance those events may have had; neither can we. Because we have no basis for concluding that Filar was prejudiced by any error the district court may have made in excluding the evidence, her argument on this issue fails. *United States v. Rettenberger,* 344 F.3d 702, 706 (7th Cir.2003); *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.,* 61 F.3d 1250, 1260 (7th Cir.1995). On appeal, Filar claims that the evidence would have shown the Board failed to follow its internal procedures at the hearing, which she says is indicative of pretext. But she forfeited the point by failing to comply with Rule 103(a)(2). *United States v. Shay,* 57 F.3d 126, 135 (1st Cir.1995); *see Germano v. Int'l Profit Ass'n, Inc.,* 544 F.3d 798, 801 (7th Cir.2008). To review the issue now would rive the Rule.

III.

Because we see no abuse of discretion in the district court's evidentiary rulings Filar challenges, the judgment is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

Everett McKinley Dirksen
United States Courthouse
Room 2722
219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

May 10, 2010 [SEAL]

BEFORE: FRANK H. EASTERBROOK, Chief Judge
RICHARD D. CUDAHY, Circuit Judge
DANIEL A. MANION, Circuit Judge

No.: 09-2489	VALERIE T. FILAR, Plaintiff-Appellant v. CHICAGO SCHOOL REFORM BOARD OF TRUSTEES, also known as BOARD OF EDUCATION OF THE CITY OF CHICAGO, Defendant-Appellee

Originating Case Information
District Court No: 1:04-cv-04679 Northern District of Illinois, Eastern Division District Judge Charles R. Norgle

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

United States District Court
Northern District of Illinois
Eastern Division

Valerie T. Filar **JUDGMENT IN A CIVIL CASE**

v. Case Number 04 C 4679

Chicago School Reform
Board of Trustees

■ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendant Chicago School Reform Board of Trustees and against plaintiff Valerie T. Filar.

Michael W. Dobbins, Clerk of Court

Date: 5/11/2009

/s/ Eric Fulbright, Deputy Clerk

526 F.3d 1054

United States Court of Appeals,
Seventh Circuit.
Valerie T. FILAR, Plaintiff-Appellant,
v.
BOARD OF EDUCATION OF the
CITY OF CHICAGO, Defendant-Appellee.
No. 07-1275.

Argued Jan. 25, 2008.
Decided May 22, 2008.

Richard T. McCaulley (argued), Sidley Austin, Chicago, IL, for Plaintiff-Appellant.

Linda Hogan, Jennifer Wu (argued), Chicago Board of Education, Law Department, Chicago, IL, for Defendant-Appellee.

Before FLAUM, ROVNER, and SYKES, Circuit Judges.

FLAUM, Circuit Judge.

Valerie T. Filar formerly taught as an untenured, full-time teacher in the Polish bilingual education department at the Edwin G. Foreman High School in Chicago. In 1999, the Board of Education of the City of Chicago, then known as the Chicago School Reform Board, approved a decision by Foreman's principal to change Filar's status from a full-time teacher at Foreman to a substitute teacher who would fill vacancies in other Chicago public schools as they arose. Filar, who was 69 at the time, objected to the decision for at least two reasons. In the first place,

she suspected that Foreman's principal had deliberately retained younger teachers in the bilingual program at her expense. In addition, Filar's osteoarthritis and dependence on public transportation made getting to the city's various schools difficult, and the Board denied her request that she only be assigned to schools that were easily accessed from bus stops. This lawsuit followed, alleging age discrimination and that the Board failed to reasonably accommodate Filar's disability. The district court granted the Board's motions for summary judgment on both claims, and this appeal followed. For the reasons set out below, we reverse the district court's grant of summary judgment with respect to the age discrimination claim but affirm with respect to Filar's disability claim.

I. Background

Filar's claims stem in large measure from allegations that the principal of Foreman High School made questionable personnel decisions that resulted in her ouster from Foreman. Understanding these allegations requires some background on Illinois's bilingual education program and the (elaborate) mechanics of a principal's relationship with the teachers in her school. Illinois law requires the State's school districts to establish programs of transitional bilingual education for students of limited English-speaking ability. ILCS §§ 5/14C-1, C-3. To staff these programs, school districts offer a transitional bilingual teaching certificate to qualified

individuals proficient in both English and a foreign language, known as a Type 29 certificate. ILCS § 5/14C-8. The Type 29 certificate is a bridge certification; teachers can teach students with limited English skills while working for a standard teaching certificate, which for secondary schools like Foreman is called a Type 09 certificate. *Id.; see generally* ILL. ADMIN. CODE tit. 23, § 25.90 (2008) (containing current qualifications). Once a teacher has attained the standard teaching certificate, she has to obtain both a bilingual "approval," which attests to her ability to provide a bilingual education, and "endorsements," which are descriptors like "Mathematics" or "Reading" that indicate the subject matters she is competent to teach. *See, e.g.*, ILL. ADMIN. CODE tit. 23, § 25. app. E (listing representative endorsements as of July 1, 2004).

Even with the proper certifications, a would-be teacher in Illinois must still get hired, and not all teaching positions are the same. Public schools in Chicago employ several different categories of teacher, each with its own moniker and level of job stability. The most secure are tenured teachers, whom a principal can only remove for "cause." 105 ILCS 5/34-84. Below tenured teachers are tenure-track or "appointed" teachers who work full time with a particular class at a specific school, and, as their name suggests, can eventually obtain substantial job security. There are also at least two kinds of non-tenure-track teachers: "cadre" substitute teachers move from school to school to cover temporary

vacancies on a daily basis; and full-time basis or "assigned" substitutes work at one school full time, just like tenure-track teachers only with less seniority and without the potential job security.

Principals have wide discretion in moving a school's teachers from a full-time basis position onto the tenure track. But how many full-time teachers a school can employ in a given year derives in large measure from the principal's available budget for the school year. Among other things, the annual budget from the Chicago Board of Education and the Budget Office lists how many positions the Board will fund in a given school year for each school program. In addition to Board-funded position, the principal may also have a certain number of teaching positions at his school funded by the State of Illinois. When the school does not have enough funded positions for all its teachers, the principal may have to "displace" unfunded teachers; that is, recategorize either tenure-track or full-time substitute teachers as "cadre" substitutes who must then fill vacancies in other city schools as they arise.

When that happens, the principal displaces teachers in reverse order of seniority. A less senior full-time basis substitute in a given subject or program will go before a more senior one; and a tenure-track teacher will not go until the principal has displaced all of the full-time basis substitutes. Although the principal possesses substantial authority to make personnel decisions, it's not absolute. The principal must first send a personnel

request to the Board's Human Resources Department. There, someone determines whether the decision complies with the Chicago Teachers Union's collective bargaining agreement and whether the teacher has the requisite certifications. Then, based on these criteria, Human Resources either approves or denies the decision.

This case arises from the events immediately before and after Filar's displacement in 1999. Filar was born on January 11, 1930 in Poland. In 1991, she received her Type 29 certification and, the next year, Foreman's principal, Dr. John Garvey, hired her to teach Computers in the school's Polish bilingual program as a full-time basis substitute. Not long after he hired Filar in 1992, Dr. Garvey displaced her, although after Filar filed a grievance she was soon reinstated. While Filar was fighting her displacement in 1992 and 1993, Dr. Garvey hired two more teachers for the school's Polish bilingual program – Piotr Monaco (born in 1957) and Kornelia Rydberg (born in 1960) – both of whom had Type 29 certifications. In September 1997, Filar received her Type 09 standard teaching certification with endorsements in Accounting and Computers, and, a month later, she obtained her bilingual approval.

The parties dispute exactly when and how Dr. Garvey made the determination, but at some point in 1999 it became clear to him that the demand had fallen somewhat for bilingual Polish education due to a decrease in enrollment. In the school year beginning 1998, Foreman had five Board-funded

positions for the Polish bilingual program; for the 1999 school year, it would lose one. What followed was a flurry of personnel decisions that would change the program and the employment status of the teachers. Two such decisions affected the other full-time substitute teachers then in the program. On July 23, 1999, Dr. Garvey sent a request to the Board that Monaco be appointed to a tenure-track position. Monaco had received his Type 09 certification in March 1999, but he had yet to receive his bilingual approval. And on September 3, 1999, two days after the school year began, Dr. Garvey sent a similar request that Rydberg be appointed to a tenure track position. Rydberg had obtained her Type 09 certification on August 18, 1999, but also had yet to receive her bilingual approval.

On September 12, 1999, Dr. Garvey then slotted a new teacher into the Polish bilingual program when he requested that the Board move a tenure-track teacher, Helena Danielska (born in 1939), into the program. Danielska had her Type 09 certification with an endorsement in mathematics and a Type 29 certificate with a Polish-bilingual endorsement. In moving Danielska into the program, Dr. Garvey moved Filar from a state-funded position to a Board-funded position and then put Danielska into Filar's old state-funded position. The Board approved the change on September 14. Finally, on September 15, Dr. Garvey hired Elaine Guzman as a tenure-track teacher to teach ESL Computers at Foreman. Guzman had the certifications needed to teach at

elementary school but needed special permission to teach because she did not yet have the Type 09 certification to teach high school students.

As things stood on September 17, 1999, Filar was the only full-time basis substitute in the Polish bilingual program and she had moved from a state-funded position to a Board-funded position. That same day, Dr. Garvey informed Filar that he was displacing her to the cadre. Following her displacement, Filar reported to the Office of Culture and Language, the department in Chicago Public Schools that is responsible for administering bilingual programs. Filar claims that someone at OCL told her to return to Foreman because her position was not being closed. Filar then returned to Foreman and on September 27, 1999 she received a second letter from Dr. Garvey stating that she was being displaced to the cadre. After she received this second letter, Filar reported to the Board again and she was told to return to Foreman as a cadre substitute. But when she arrived, Dr. Garvey refused to accept her as a cadre substitute at Foreman, explaining later in his deposition that he was concerned over the bad blood from the displacement and the potential disruptive effect it might have on the school.

Filar then filed a grievance challenging her displacement. In December 1999, Dr. Garvey submitted a letter regarding his decision to displace Filar. He stated that he had displaced her because "she was the least senior member of the faculty in the Polish Bilingual Program" and the "decrease in

enrollment in the Polish program necessitated a decrease in the staff. Ms. Filar was the only [full-time basis substitute] left in the Polish Bilingual program at this time and was displaced for that reason."

Filar's new role as a cadre substitute was complicated by the fact that she suffered from osteoarthritis. Filar's arthritic hip made walking long distances difficult, and she could not drive herself to work. In November 1999, she requested an accommodation for her disability from Chicago Public Schools. She wanted to be staffed at "one place of work with minimum walking distance from public transportation." The Board denied her request, stating that cadre substitutes "must report to whichever school the Substitute Center assigns [them] to on the day that [they] receive the assignment" and that her request was "not a matter for work-place reasonable accommodation."

This lawsuit followed in July 2004, alleging age discrimination under the Age Discrimination in Employment Act based on her September 1999 displacement and that the Board violated the Americans with Disabilities Act by failing to accommodate her disability. After discovery, the Board filed its motion for summary judgment as to both claims, which the district court granted. As to Filar's discrimination claim, the court reasoned that she had failed to show a similarly situated employee and thus could not prove her prima facie case. Even if she could, the court reasoned, Filar had presented insufficient evidence of pretext for the case to proceed to trial. As

for Filar's ADA claim, the court reasoned that the Board had no obligation to staff her at schools near public transportation. Because proximity to public transportation did not affect her ability to actually teach in a classroom, the accommodation she had requested was not related to the "essential functions of the employment position," scotching her ADA claim. This appeal followed.

II. Discussion

Filar raises two general issues on appeal, tracking her two causes of action. First, she claims that the district court erred in granting the Board's motion for summary judgment as to her age discrimination claim. Second, she argues that the district court had an unduly cabined view of the "essential functions" of the cadre substitute teacher and thus erroneously granted the Board's summary judgment motion as to her ADA claim. We review both claims de novo, drawing all reasonable inferences in Filar's favor. *EEOC v. Bd. of Regents of University of Wisconsin Sys.*, 288 F.3d 296, 301 (7th Cir.2002). The following sections discuss each in turn.

A. ADEA Claim

As she did before the district court, on appeal Filar challenges her displacement from Foreman in September 1999, alleging that age discrimination, and not some legitimate personnel concern, was the engine behind Dr. Garvey's decision. Filar chose to

prove her case indirectly through an adapted version of the burden-shifting framework first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[1] As applied to employment actions like displacement, if a plaintiff establishes her prima facie case, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse employment action; after which the burden shifts back to the plaintiff to present some evidence that this reason is a pretext for discrimination. *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir.2000). This procedural device sharpens the factual issues for a possible trial; the employer must provide some reason for its action that a plaintiff can attack, rather than stand mute except to deny the sufficiency of the plaintiff's evidence. Filar raises several issues related to this framework, discussed in turn in the sections that follow.

---

[1] Filar's brief justifies this decision as resulting from a lack of "direct evidence of discrimination." But despite the nomenclature, "'direct' proof of discrimination is not limited to near-admissions by the employer that its decisions were based on a proscribed criterion (*e.g.*, 'You're too old to work here.'), but also includes circumstantial evidence which suggests discrimination through a longer chain of inferences." *Atanus v. Perry*, 520 F.3d 662, 670, 2008 WL 696908, (7th Cir.2008). One can question whether the differences that remain between the "direct" and "indirect" methods are more a result of history than logic. In any event, Filar's claimed lack of "direct" evidence is not necessarily a sufficient reason to scuttle a "direct" method claim.

1. Appropriate Prima Facie Case

Filar argues first that the court used the wrong set of factors to evaluate her prima facie case. The district court applied the familiar four-factor prima facie case for adverse employment actions requiring proof that (1) Filar was over age forty; (2) her job performance met Dr. Garvey's expectations; (3) she suffered an adverse employment action; and (4) the employer treated "similarly situated" employees at least ten years younger more favorably. *See Burks v. Wisconsin Dept. of Transp.*, 464 F.3d 744, 750-51 (7th Cir.2006). On appeal, Filar instead characterizes her displacement as being part of a mini-reduction in force. When an employee is dismissed as part of a mini-RIF, the dismissed worker's duties are spread out among the remaining employees. *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 690 (7th Cir.2006). The retention of younger employees who take on the dismissed employee's responsibilities "is nothing more than a demonstration of more favorable treatment, particularly tailored to the factual circumstances of a mini-RIF case." *Id.* at 690 n. 1. As a result, the prima facie case in this context swaps the fourth requirement in the basic framework – that a similarly situated younger employee was treated more favorably – with another – that her duties were absorbed by younger workers who were retained following the mini-RIF. *Id.* at 690-691. Thus, in Filar's estimation, the district court applied the wrong standard and thus erred in requiring proof

that "similarly situated" younger teachers were treated more favorably.

The district court cannot be faulted for failing to employ the mini-RIF standard because a mini-RIF claim was not fairly before it. Filar's complaint did not include allegations consistent with a mini-RIF claim. And in her response to the defendant's motion for summary judgment, Filar argued that a reduction in force, the regular-sized variety, precipitated her displacement. As this Court has explained, the relevant factual inquiry in a reduction-in-force case is not the same as a mini-RIF case. In the former, a plaintiff's position was eliminated entirely and will not be refilled whereas "[t]he point of a mini-RIF unlike a true RIF, is that the job really was not eliminated at all; because the fired employee's duties were absorbed by others, they were effectively 'replaced,' not eliminated." *Bellaver v. Quanex Corp.*, 200 F.3d 485, 495 (7th Cir.2000).

The practical effect of this formal difference, one that is fatal to Filar's claims, is that the type of proof expected of a mini-RIF claim is different than that stemming from a formal RIF. For her mini-RIF claim, Filar had to show that her position was "absorbed" by the remaining younger co-workers, not just eliminated. *Michas v. Health Cost Controls of Illinois, Inc.*, 209 F.3d 687, 693 (7th Cir.2000). But Filar did not purport to make this showing in either her memorandum in opposition to the Board's motion for

summary judgment or her Local Rule 56.1 statement of facts.[2] Instead, the thrust of her RIF argument consisted of a statement that "younger workers . . . were favorably retained in the RIF while [she] was displaced." An apt statement of her evidentiary burden in a RIF claim, but not a mini-RIF one. In short, the district court did not err in its treatment of Filar's claim because it was never asked to treat such a claim. *See Weigel v. Target Stores,* 122 F.3d 461, 464 (7th Cir.1997). Accordingly, the district court applied the right prima facie case.

2. "Similarly Situated" Younger Employees

Even so, did it apply the standard correctly? The parties agree that (1) Filar was over forty in September 1999; (2) she was meeting the school's legitimate employment expectations; and (3) she suffered an adverse employment action – three of the

---

[2] Filar's presentation of the evidence in her Local Rule 56.1 statement of the facts was also inconsistent with a mini-RIF claim. On appeal, she only points to two facts from her statement – that Rydberg and Monaco taught computers in the 1999 school year – to support her mini-RIF claim. That these two were teaching computers, a subject that Filar had taught prior to displacement, does not mean that they "absorbed" her duties after her departure. To show that, something more would be needed – for example, a showing that this was an increase in their duties. *Michas,* 209 F.3d at 693. In any event, the mini-RIF claim was simply not before the district court, as a legal matter or as represented by the facts.

four elements of her prima facie case. But the parties dispute whether Filar presented a "similarly situated" younger employee who was treated more favorably. The district court rejected each of Filar's proposed comparators because, prior to Filar's displacement, each was a tenure-track teacher, not a full-time substitute like Filar. Because tenure-track teachers do not compete with full-time substitutes in terms of seniority, the court reasoned, Filar could not point to them as "similarly situated" younger employees and thus could not establish her prima facie case.

We disagree. Whether two employees are "similarly situated" is a common sense inquiry that depends on the employment context. *Radue*, 219 F.3d at 618. The purpose of the prima facie case is to ensure that there is enough evidence to raise the specter of discrimination, justifying judgment for the plaintiff if the employer does not provide a legitimate business reason for its action. *See Collier v. Budd Co.*, 66 F.3d 886, 890 (7th Cir.1995). All things being equal, if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination. *See Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir.2007). The "similarly situated" prong establishes whether all things are in fact equal. *Id.* To make this showing, a plaintiff need not present a doppelganger who differs only by having remained in the employer's good graces. But the comparator must still be similar enough "to eliminate confounding

variables, such as differing roles, performance histories, or decision-making personnel, [so as to] isolate the critical independent variable: complaints about discrimination." *Id.*

Two of the comparators offered by Filar – Rydberg, 42, and Monaco, 39 – were "similarly situated" younger employees for purposes of her prima facie case. All three had taught at Foreman for roughly the same period of time. Dr. Garvey hired Filar in 1992 and he hired both Rydberg and Monaco soon thereafter while Filar was grieving her original displacement. All three were properly certified, and by all measures their duties were the same. To the extent that their certifications differed at the time that Dr. Garvey displaced Filar, it was because Filar had received her Type 09 teaching certificate in 1997 whereas Rydberg and Monaco had only attained it in 1999. In addition, Filar's Type 09 certificate had the bilingual approval whereas neither Rydberg's nor Monaco's did. Dr. Garvey supervised all three teachers, and, as far as the record shows, none had any disciplinary or performance issues at the time of Filar's displacement. Dr. Garvey considered Filar to be a good teacher; he had consistently rated Filar's performance evaluations as "Superior" or "Excellent" from 1994 through 1999. The record does not indicate what scores Rydberg and Monaco received, but given Filar's high marks we can assume for present purposes they were similar in this regard as well.

Despite these similarities, the district court considered their differences in seniority to be fatal to

any showing of similarity. As the court correctly noted, full-time substitutes were less senior to tenure-track teachers for purposes of displacement. And, unlike Filar, both comparators were tenure-track teachers. In some circumstances, differences in seniority will preclude a showing that two employees are "similarly situated" or of age discrimination more generally. To the extent that seniority is a simple proxy for something like the length of employment and is something that an employer must credit when making employment decisions, differences in seniority will tend to make two employees dissimilar for purposes of the plaintiff's prima facie case. *See, e.g., Doe v. First Nat. Bank of Chicago,* 865 F.2d 864, 877 (7th Cir.1989) (crediting comparator's "long tenure" in denying that she was "similarly situated"). This is because, in making the employment decision, the employer had to credit a factor over which it had no control, and thus a finding of intentional age discrimination would be implausible given that the employer's "intent" – discriminatory or otherwise – was largely irrelevant to the decision. Had this been the case at Foreman, the district court would have been right to conclude that Filar was not "similarly situated" to tenure-track teachers.

But where seniority is unmoored from everything but the discretion of the employer, the simple fact that the comparator is more senior to the plaintiff may not be dispositive, even where the employer must credit seniority in employment decisions. An employer could exercise its discretion in conferring

seniority in a discriminatory fashion, making an immediately subsequent employment action based on seniority discriminatory as well. In a related context, we have held that an "employer cannot frustrate the statute merely by assigning every employee a different job title." *Bellaver v. Quanex Corp.*, 200 F.3d 485, 494 (7th Cir.2000). Similarly, an employer cannot defeat a claim of discrimination by giving younger employees greater seniority rights immediately before displacing an older, but less senior, employee.

This is not to say that Dr. Garvey and the Board have done so in this case. But the district court concluded that the differences in seniority alone were sufficient to defeat a finding that Filar's comparators were "similarly situated." Given the manipulability of seniority at Foreman, this was error. Although seniority had some bite to it when a principal had to displace teachers – by rule, less senior teachers went before more senior – the conferral of seniority itself consisted of nothing more than a mine-run, discretionary personnel decision made by the principal. *But see Adelman-Reyes v. Saint Xavier University*, 500 F.3d 662, 667 (7th Cir.2007) (discussing reluctance of court to get involved in tenure decisions where accompanied by "multiple layers of independent review"). In addition, as seen above, a teacher that a principal moved to a tenure-track position did not thereby obtain greater duties. Nor did the principal necessarily make the decision solely on the basis of some difference in the teachers' respective qualifications – something that might otherwise preclude a

showing of "similarly situated." Whether on the tenure track or a full-time substitute, all three were teachers with, as far as the evidence shows, nearly identical responsibilities and qualifications. *See Bellaver*, 200 F.3d at 494 (stating that comparators and plaintiff "had the ability to perform each other's tasks, even though they had different titles and specific responsibilities"). In short, although principals are free to make seniority decisions as they see fit – just as any employer can move an employee from one job to the next – the differences in seniority here were not inconsistent with intentional discrimination, as the district court implied. As a result, in light of the other factors listed above, Filar has pointed to two "similarly situated" younger employees to establish her prima facie case.

3. The Board's Legitimate Non-Discriminatory Reason and Filar's Evidence of Pretext

Filar having established her prima facie case, the Board must articulate a legitimate business reason for displacing her and not the younger teachers. Before the district court and here on appeal, the Board has pointed to the decline in enrollment in the Polish bilingual program combined with the fact that Filar was the least senior teacher in the program. The issue now is whether this reason was pretextual. Showing pretext requires "[p]roof that the defendant's explanation is unworthy of credence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133,

147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *see also Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 737 (7th Cir.2006) ("Pretext is a 'lie, specifically a phony reason for some action.'"). The plaintiff's ultimate burden is to show that intentional age discrimination motivated the employer's action, but marshaling such evidence does not always require a smoking gun or an eyewitness to the employer's discriminatory designs; "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097. Thus, in certain circumstances, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.*

We conclude that Filar has presented enough evidence to undermine the Board's claim, specifically the evidence of the timing and effect of the series of personnel decisions Dr. Garvey made over the summer and fall of 1999. A jury could conclude that the only reason that Filar was the least senior full-time substitute at the time of the displacement decision was because Dr. Garvey had put her, and not the younger teachers, in that position. First, in spring 1999, Dr. Garvey knew that the demand for Polish bilingual education would decrease. An affidavit and summary chart from Rosa Vazquez, the Executive Administrator in the Department of Language of Culture, indicated that Foreman would lose one

Board-funded position between 1998 and 1999, though the date of this report was the fall of 1999. In her deposition, she stated that school principals received a similar report estimating prospective demand for school programs in the spring of every school year. In addition, this information would be available "live" to school principals throughout the year. Stephen Heller, a Human Resources specialist, similarly described the staffing process as being ongoing throughout the school year, including through the use of projections. Thus, the evidence, viewed in the light most favorable to Filar, shows that in spring 1999 Dr. Garvey knew he would be losing one Board-funded position.[3]

Second, in spring and summer 1999, Dr. Garvey made personnel decisions to move Filar from the most to the least senior full-time substitute position. At the end of the 1998 school year, Filar was still a full-time basis substitute, having a slightly longer tenure than either Rydberg or Monaco. In March 1999, Rydberg

[3] Filar makes at times contradictory claims regarding when Dr. Garvey actually knew that someone would need to be displaced. On the one hand, she says that Dr. Garvey "embarked on a plan to displace Filar that dated back to the early summer of 1999." And that he wanted "to isolate Filar as the only [full-time substitute] in the Polish bilingual program." But in the next breath, she claims that staffing needs could not be made until the fall of 1999, which is hard to reconcile with her argument that Dr. Garvey bent procedural personnel rules to his designs from the "early summer of 1999." Because the record does not support her latter claim, we construe her more general claim consistently with what the record does support.

received his Type 09 certificate, though not the bilingual approvals, and on July 23, 1999 Dr. Garvey appointed Rydberg to a tenure-track position. On August 18, 1999, Monaco received her Type 09 certificate, similarly without her bilingual approvals, and on September 3, 1999, Dr. Garvey appointed her to a tenure-track position. In justifying his decisions to move Rydberg and Monaco, but not Filar, to tenure-track positions, Dr. Garvey said that it was based on his "judgment" that they were "more suited to the position." But in later explaining how he exercised this "judgment," Dr. Garvey could not recall any of the specifics. Third, on September 12, 1999, Dr. Garvey moved Filar out of a state-funded position – which would remain funded – into a Board-funded position – which would not. He then displaced Filar.

Up to this point, the evidence is consistent with both a desire to oust Filar – for whatever reason – and an intent to discriminate against her because of her age. Nonetheless, the differential treatment afforded Filar and her younger colleagues, along with the timing of Dr. Garvey's decisions, inch Filar's case forward and satisfy us that an issue of fact exists as to discrimination. First, Dr. Garvey failed to appoint Filar once she was properly certified but almost immediately appointed younger teachers to more senior positions. *See Gordon v. United Airlines, Inc.*, 246 F.3d 878, 892 (7th Cir.2001) ("A showing that similarly situated employees belonging to a different racial group received more favorable treatment can also serve as evidence that the employer's proffered

legitimate, nondiscriminatory reason for the adverse job action was a pretext for racial discrimination."); *see also Fischer v. Avanade, Inc.*, 519 F.3d 393, 405-06 (7th Cir.2008). Filar had received her Type 09 certification in 1997. Despite the fact that it was fairly common for full-time substitutes to become tenure-track teachers after receiving this certification, Filar did not move once she received her Type 09 certification. But when Rydberg, 42, and Monaco, 39, received their certifications in spring and summer 1999, Dr. Garvey almost immediately made them tenure-track teachers. Filar maintained "Superior" and "Excellent" in her reviews, and in his deposition Dr. Garvey could not give any reason for failing to move Filar to the tenure track except that "he felt these [other] teachers suited [tenure-track positions] better." Because the only salient difference between Filar and the younger teachers was age, a jury could conclude that age motivated Dr. Garvey's decisions.

In addition, the timing of Dr. Garvey's appointment of Monaco and Rydberg was questionable. Both Rydberg and Monaco went from full-time substitutes to protected tenure-track teachers immediately before Dr. Garvey displaced the least senior full-time substitute. Without first making these two personnel moves, Dr. Garvey would have needed to displace a younger teacher, and not Filar. When viewed with Filar's prima facie case and the other evidence, this evidence of Dr. Garvey's seemingly strategic behavior

would be sufficient to support a finding of discrimination.[4]

---

[4] This case also implicates a line of reasoning in our case law that deserves mention. This Court has held that an "inference of nondiscrimination" in age discrimination cases arises when the plaintiff is already over 40 when hired and the same person does the hiring and the firing. *See, e.g., Ritter v. Hill 'N Dale Farm, Inc.*, 231 F.3d 1039, 1045 (7th Cir.2000); *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 399 (7th Cir.1997). This inference has the most bite where "a relatively short time span" separates the two. *See Ritter*, 231 F.3d at 1044 (two years), *Chiaramonte*, 129 F.3d at 399 (termination followed two years after retention of employee in merger); *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir.1994) (two years). This is because it is unlikely that a decisionmaker developed an "aversion to older people" in the "relatively short time span" between hiring and firing. *Chiaramonte*, 129 F.3d at 399. Here, Filar was well within the protected class, 62 years old, when hired by Dr. Garvey, who ultimately displaced her. Nonetheless, two considerations convince us that this inference of nondiscrimination is not controlling in this case. First, Filar's hiring and displacement were seven years apart, a period sufficient to dull the inference that Dr. Garvey had not discriminated. Aside from flagrant ageism – or an "aversion to older people" – the ADEA aims to curb actions based on an employer's unfair assumptions about an older worker's productivity. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586-87, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004); 29 U.S.C. § 621(a)(2) (2006). As workers age, their marginal productivity may fall and the costs of retaining them may rise, whether through higher benefits costs or the higher salaries they've earned. *Cline*, 540 U.S. at 586-87, 124 S.Ct. 1236. As a result, employers might think that younger workers can do the same work as older workers at a lower price, whether measured in time or money. Giving effect to these assumptions by swapping the older with the younger worker would be an act of age discrimination. *Hazen Paper Company v. Biggins*, 507 U.S. 604,

(Continued on following page)

The ultimate verdict in this case is by no means a foregone conclusion. A jury could conclude that Dr. Garvey just wanted to displace Filar because that was the best decision for the school. Or the jury could surmise that Dr. Garvey meant to ditch an older worker by giving younger teachers seniority

---

610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."). For this reason, the fact that a worker was within the protected class when hired might not be as telling in some cases: An employer may assume an over-forty employee is productive when hired but not years later. It may be reasonable to assume that Dr. Garvey did not have an "aversion to older people" because he hired Filar when she was 62. But it's just as reasonable to assume that Dr. Garvey viewed Filar as productive at 62 but not at 69. Second, placing too strong a reliance on an inference of nondiscrimination may go too far at the summary judgment stage. In Filar's case, this inference would be in favor of the party moving for summary judgment. But the Supreme Court and this Court have recognized that summary judgment in discrimination cases should not be treated differently than other kinds of cases. *See Reeves*, 530 U.S. at 148, 120 S.Ct. 2097 ("[T]rial courts should not 'treat discrimination differently from other ultimate questions of fact.'") (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)); *Adams*, 231 F.3d at 428. Under Rule 56, "the drawing of legitimate inferences from the facts are jury functions," and the court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 150-51, 120 S.Ct. 2097 (so describing the approach under Rule 50 where "the inquiry . . . is the same"). In light of the above, we do not believe that a jury is required to believe that Dr. Garvey did not discriminate against Filar when she was 69 just because he hired her when she was 62. Thus, the inference of nondiscrimination does not control in this case.

immediately prior to making a seniority-based personnel decision. Because the evidence slightly preponderates towards the latter and because of the Supreme Court's "cautionary note not to grant summary judgment too readily when facts are susceptible to two interpretations," *Adams v. Ameritech Svces., Inc.*, 231 F.3d 414, 428 (7th Cir.2000); *see also Gordon*, 246 F.3d at 893, granting the Board summary judgment on this claim was unwarranted, and we therefore reverse.

B. ADA Claim

Filar also appeals the district court's order granting the Board's motion for summary judgment as to her failure to accommodate claim under the Americans with Disabilities Act. The ADA prohibits "discriminat[ion] against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and other privileges of employment." 42 U.S.C. § 12112(a). Discriminating against a "qualified individual with a disability" means, as is relevant to Filar's claim, not making a "reasonable accommodation" where doing so would allow a disabled employee to "perform the essential functions of the employment position" without imposing an "undue hardship" on the employer. *See* 42 U.S.C. §§ 12112(b)(5)(A) (reasonable accommodation and undue hardship); 12111(8) (definition of "qualified individual with a disability"). In other words, if the employer can make reasonable changes to features of the job or the work

environment so that a disabled person can work satisfactorily, the employer has to make those changes.

As discussed, Filar has an arthritic hip that makes walking long distances difficult. After Dr. Garvey displaced Filar from Foreman to the roving cadre of substitutes, she requested that the Board staff her at "one place of work with minimum walking distance from public transportation," listing Foreman High School and three other acceptable schools. Later, the Board denied her request for an accommodation. In a letter from the ADA Administrator in the Human Resources department, the Board stated that displaced cadre teachers "must report to whichever school the Substitute Center assigns [them] to on the day that [they] receive the assignment." How the cadre teacher did this was "not a matter for work-place reasonable accommodation." The Board also stated that, "as a result of the School Reform Act, Central Office cannot unilaterally assign an employee to a school as an accommodation without the acceptance and approval of the principal of the receiving school."

Filar argued below that the Board should have granted her request, but the district court disagreed. In dismissing Filar's disability claim, the court held that Filar was not a "qualified individual with a disability" because she had not "allege[d] that this hip condition substantially prohibits her from conducting her job as a teacher." And her "proximity to public transportation does not affect the way in which she

teaches Polish in her capacity as a substitute teacher."

Now on appeal, Filar claims this was error. We affirm the district court's dismissal of this claim, though for different reasons. The fact that Filar's hip condition did not affect her ability to teach, which the district court credited, does not end the matter; she can still be a "qualified individual with a disability." The ADA defines this term of art as an "individual with a disability who, *with or without reasonable accommodation,* can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). As the text indicates, that an employee can "perform the essential functions" of a teaching position despite her disability and "without reasonable accommodation" does not exclude her from the definition of a "qualified individual with a disability." To put it another way, an "*un* qualified individual with a disability" would be someone with a disability who could not do the job no matter what the employer did to reasonably accommodate. *See Hammel v. Eau Galle Cheese Factory,* 407 F.3d 852, 862 (7th Cir.2005).

Instead, the question is whether her requested accommodation was reasonable, and we don't think it was. The ADA does not exhaustively define a "reasonable accommodation," though the term "may include . . . making existing facilities used by employees readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12111(9)(A). Because walking long distances from the bus stop makes it difficult to access certain schools, Filar

argues that her request was for something akin to this type of accommodation. In support of her claim, she cites to this Court's decision in *EEOC v. Sears Roebuck & Co.*, 417 F.3d 789 (7th Cir.2005). In *Sears Roebuck,* we held that an employer had not done enough to make the disabled employee's work station accessible to her. Due to her disability, the plaintiff had problems walking long distances. When one supervisor told her she could use a shortcut through another department or eat in a stockroom near her work station, a different supervisor would either rescind the offer or discipline the plaintiff for her actions. In addition, Sears gave the plaintiff a parking spot reserved for disabled employees, but it did nothing to shorten her walk to her work station. Something more, we held, was necessary: "these were not reasonable accommodations because they did not consistently or effectively make the Sears facility accessible to" the plaintiff. Reasoning by analogy, Filar urges us to reach the same conclusion here, saying that her workplace – any one of the schools she would need to work in on any given day – was similarly inaccessible unless near a bus stop.

At the highest level of abstraction, Filar's claim has some surface appeal. In addition to the obligations discussed in *Sears Roebuck,* this Court has held that reassignment to a vacant position can be part of the employer's obligation to reasonably accommodate. *See DePaoli v. Abbott Laboratories,* 140 F.3d 668, 675 (7th Cir.1998). Without knowing the particulars of the Board's cadre-assignment policies,

Filar might appear to be requesting just such a "reassignment," only to a specific subset of the schools in the Chicago Public Schools that would be "accessible" to public transportation.

But three aspects of the request convince us that it was just not reasonable. First, based on the requirements of a cadre substitute, Filar's request would have amounted to preferential treatment, which the ADA does not require. *Williams v. United Ins. Co. of America*, 253 F.3d 280, 282 (7th Cir.2001). The collective bargaining agreement between the Board and the Chicago Teachers Union requires cadre teachers to be "continuously available to perform substitute service" and to "accept all assignments in any and every school" as they became available. Under the ADA, an "employer is not required to give the disabled employee preferential treatment, as by . . . waiving his normal requirements for the job in question." *Williams*, 253 F.3d at 282. Here, Filar was in essence requesting to opt out of the cadre-assignment system; she only wanted "one place to work" and not to be subjected to the far-reaching assignment system applicable to cadre substitutes, which may have made access to the schools difficult. Nor would she be "available" as a substitute in the event that she was assigned to a school that did not fit her request. This falls well short of the cadre substitutes' obligations and is thus more than the ADA requires of the Board.

Second, the Board did not have the authority to assign a cadre substitute to "one place to work."

Under the collective bargaining agreement, the Board itself was not responsible for slotting teachers at particular schools. Instead, the cadre substitute would be "given the opportunity to apply and be interviewed for vacant positions." And the principal could select a member of the cadre to be a full-time substitute "at any time . . . to fill an existing vacancy." The principal's personnel decisions, as discussed in the previous section, resulted largely from the discretion he or she enjoyed. The Board could not require a principal to take a particular cadre substitute, as Filar requested.

Finally, even assuming that something could be arranged with Filar under the collective bargaining agreement, the administrative burden posed by Filar's request would have been prohibitively weighty. The plaintiff must make a prima facie showing "that the accommodation is reasonable in the sense both of efficacious and of proportional to costs." *Oconomowoc Residential Programs v. City of Milwaukee,* 300 F.3d 775, 784 (7th Cir.2002). The initial showing made by Filar in her request for an accommodation was simply too barebones to show that the request was reasonable. There are at least 655 public schools in the Chicago Public Schools system, including 116 high schools. *See* CPS At A Glance, http:// www. cps. k 12. il. us/ At AGlance. html (last visited May 14, 2008). And the CTA has approximately 2000 buses that operate over 154 routes with 12,000 bus stops. *See* CTA Overview, http:// www. transitchicago. com/ welcome/ overview.

html (last visited May 14, 2008). In her request for accommodation and her appeal before this Court, Filar has not given any indication of how many of the 116 high schools would qualify besides the four that she listed in her request for an accommodation. Thus, the Board had the option of either assigning her to one of the four schools she requested – in violation of the collective bargaining agreement – or researching those schools in the City that satisfied her needs – a costly task. Neither option is reasonable. For all these reasons, the district court did not err in rejecting Filar's ADA claim.

III. Conclusion

For the foregoing reasons, we REVERSE the district court's order of summary judgment as to Filar's age discrimination claim and AFFIRM the district court's order of summary judgment as to Filar's disability claim.

2007 WL 79290

United States District Court,
N.D. Illinois, Eastern Division.

Valerie T. FILAR, Plaintiff,

v.

CHICAGO SCHOOL REFORM BOARD OF TRUSTEES, Defendant.

No. 04 C 4679.

Jan. 5, 2007.

Richard T. McCaulley, Sidley Austin LLP, Paul W. McAndrews, McAndrews, Held & Malloy, Ltd., Chicago, IL, for Plaintiff.

Sherri Thornton, Chicago Board of Education, Linda Hogan, Ruth M. Moscovitch, Board of Education of the City of Chicago, Chicago, IL, for Defendant.

OPINION AND ORDER

NORGLE, J.

Before the court is Defendant's Motion for Summary Judgment brought pursuant to Federal Rule of Civil Procedure 56(c). For the following reasons, Defendant's Motion for Summary Judgment is granted.

I. BACKGROUND[1]

A. Facts

This case arises out of Plaintiff Valerie Filar's termination from her position as a substitute teacher at Foreman High School, in Chicago, Illinois. In 1992, Valerie Filar ("Filar") began working as a full-time basis substitute teacher ("FTB") at Foreman High School, in Chicago, Illinois. An FTB is a teacher who is assigned to one school to teach full time. FTBs do not have tenure track, and do not have any seniority rights over other appointed teachers.

According to Defendant Chicago School Board (the "Board"), an "appointed teacher" is a certified teacher appointed to a position who begins the process of acquiring tenure. Appointed teachers do not compete with FTBs for teaching positions.

In 1995, Filar began to experience hip problems and was later diagnosed with severe osteoarthritis. This ailment prevent Filar from walking long distances; however, she did not require the use of a cane or other walking device.

During the 1998-1999 school year, enrollment of Polish-bilingual students at Foreman decreased, and as a result, one teaching position would be eliminated for the upcoming academic year. The Board alleges

---

[1] The court takes the undisputed facts from the parties' Local Rule 56.1 Statements, and notes disputed facts within the text.

that instead of closing one of the teaching positions, a principal could choose to remove the Polish bilingual designation from one of the FTB designated teachers. Principal Garvey, of Foreman High School, stated that based on his observations of the FTB teachers, he felt that Filar should be removed from the program. Principal Garvey needed the approval for this decision from a member of the Human Resources ("HR") staff. Stephen Heller ("Heller"), an HR specialist, reviewed Garvey's decision and analyzed whether Filar's removal complied with Board policy. Heller reviewed Filar's certifications and endorsements to see if she had seniority over other FTBs. According to Heller, at the time of Filar's transfer, she did not have seniority over any other FTBs in the areas in which she was eligible to teach, which included Polish.

On September 27, 1999, the Board notified Filar that she was displaced from the FTB teaching pool. Filar returned to Foreman as a cadre substitute teacher for two weeks. The Board states that the "cadre" was a group of teachers who where displaced from schools through the Chicago Public Schools ("CPS") system, and who performed day-to-day substitute teaching work at whichever school the Board assigned them to on a daily basis. The substitute center told Filar that Foreman would no longer accept her to teach on a substitute basis, and that she would be assigned to a different school. Garvey stated that he did not accept Filar as a cadre substitute teacher at Foreman after her displacement

from the FTB list because he believed she was upset at being displaced, and that it might cause conflict for Filar to work at Foreman where she would work with people who were still on staff, or had not been displaced.

B. Procedural History

On November 12, 1999, Filar filed a grievance with the School Board alleging that she was improperly displaced. On January 14, 2000, the Board denied Filar's grievance. Then, on July 16, 2004, Filar filed her Complaint in the United States District Court for the Northern District of Illinois, alleging substantive and retaliatory violations of Title VII, and violations of the Americans with Disabilities Act ("ADA"). On July 15, 2005, Filar filed her Amended Complaint. Then, on July 27, 2006, the Board filed its Motion for Summary Judgment. Filar filed her Response on September 22, 2006, and the Board Replied on October 13, 2006. The Board's Motion for Summary Judgment is fully briefed and before the court.

II. DISCUSSION

A. Standard of Review

Summary judgment is permissible when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The nonmoving party cannot rest on the pleadings alone, but must identify

specific facts, *see Heft v. Moore*, 351 F.3d 278, 283 (7th Cir.2003), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. *See Vukadinovich v. Bd. of Sch. Tr.'s of North Newton School*, 278 F.3d 693, 699 (7th Cir.2002).

In deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. *See Stinnett v. Iron Works Gym/Executive Health Spa, Inc.*, 301 F.3d 610, 613 (7th Cir.2002). The court views the record and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See* FED. R. CIV. P. 56(c); *see also Koszola v. Bd. of Educ. of City of Chicago*, 385 F.3d 1104, 1108 (7th Cir.2004). "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *see also First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 280, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Spiegla v. Hall*, 371 F.3d 928, 935 (7th Cir.2004). The choice between reasonable inferences from facts is a jury function. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

When a party moves for summary judgment, the court must view the record and all inferences in a light most favorable to the non-moving party. *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 821 (7th Cir.2000). However, the inferences construed in the non-moving

party's favor must be drawn from specific facts identified in the record that support that party's position. *See Szymanski v. Rite-Way Lawn Maintenance Co.*, 231 F.3d 360, 364 (7th Cir.2000). Under this standard, "[c]onclusory allegations alone cannot defeat a motion for summary judgment." *Thomas v. Christ Hospital and Medical Center*, 328 F.3d, 890, 892-93 (7th Cir.2003) (citing *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)).

B. Filar's Substantive Claims

1. The ADA

The ADA forbids employers to discriminate against any "qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a); *see Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir.2004). The term "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *see also Byrne v. Avon Products, Inc.*, 328 F.3d 379, 380 (7th Cir.2003). The plaintiff bears the burden of proof on the issue of whether he is a "qualified individual" under the ADA. *See E.E.O.C. v. Yellow Freight System, Inc.*, 253 F.3d 943, 948 (7th Cir.2001); *Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1003 (7th Cir.1998); *see also Arbaugh v.*

Y & H Corp., ___U.S. ___,___, 126 S.Ct. 1235, 1244, 163 L.Ed.2d 1097 (U.S.2006).

Under the *McDonnell Douglas* method, a female plaintiff who alleges age discrimination must establish four elements: (1) that she is a member of a protected class; (2) that she is performing her job satisfactorily; (3) that she suffered an adverse employment action; and (4) that she was treated less favorably than at least one male colleague. *Farrell v. Butler Univ.*, 421 F.3d 609, 613 (7th Cir.2005) (citing *Lim v. Trus. of Ind. Univ.*, 297 F.3d 575, 580 (7th Cir.2002)).

Once the plaintiff has established a prima facie case, the burden shifts to the defendant to provide a legitimate, non discriminatory reason for the decision. *Id.* If the defendant satisfies its burden, the burden shifts back to the plaintiff to show that the defendant's explanation was pretextual. *Id.* To establish pretext, the plaintiff may show that the reasons given by the employer are factually baseless, were not the actual motivation for the decision, or were insufficient to motivate the decision. *Stewart v. Henderson*, 207 F.3d 374, 376 (7th Cir.2000). The failure to establish any one of the initial four elements defeats a plaintiff's discrimination claim. *Id.* With these principles in mind, we turn to the Board's Motion for Summary Judgment.

2. Filar's ADA Claims

Filar produces no direct evidence that the Board discriminated against her on the basis of her age, by removing her from the FTB list of teachers. Filar even admits in her deposition that Garvey, nor any Board member made comments to her in regards to hear age. *See* Filar Dep., at 101. As a result, Filar must proceed under the indirect method of proof.

The Board concedes that Filar belongs to a protected class, performed her job satisfactorily, and was subject to an adverse employment action as a result of her removal from an FTB teacher to a day-to-day substitute in the cadre. *See* Def.'s Mem. in Support of Summ. J., at 7, n. 4. Therefore, the only issue remaining is whether Filar can establish that similarly situated employees were treated more favorably than herself.

a. Similarly Situated Employees

A similarly situated employee "is one who is 'directly comparable to the plaintiff in all material aspects.'" *Bio,* 424 F.3d at 596 (quoting *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir.2002)); *see Walker,* 410 F 3d at 396 (quoting *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617-18 (7th Cir.2000)). To determine whether two employees are similarly situated, the court must "look at all relevant factors, including whether the employees "(i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same

supervisor, and (iv) had comparable experience, education, and other qualifications – provided the employer considered these latter factors in making the personnel decision."' *Bio*, 424 F.3d at 596 (quoting *Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520, 532 (7th Cir.2003)). The Seventh Circuit indicates that two employees are similarly situated if "they are directly comparable to [each other] in all material respects." *Walker*, 410 F.3d at 396 (quoting *Patterson*, 281 F.3d at 680).

Viewing all of these factors together, Filar cannot establish that any of her co-workers are similarly situated to her for purposes of the ADA, and therefore her case is doomed. *See Stewart*, 207 F.3d at 376; *see also Racicot v. Wal-Mat Stores, Inc.*, 414 F.3d 675, 678 (7th Cir.2005).

Filar compares herself to other teachers who were not classified as FTBs. Specifically, Filar claims that Piotr Monaco ("Monaco"), Tadeusz Krason ("Krason"), Helena Danielska ("Danielska") and Czeslawa Kolak ("Kolak") were similarly situated to herself, yet did not receive any adverse employment action. However, according to the Board rules, "appointed teachers do not compete with FTBs in terms of seniority." Def.'s Stmt. of Mat. Facts, ¶ 9; Ex. D. An appointed teacher who has been with the school for one day has priority over an FTB who has been teaching for any number of years. Therefore, appointed teachers are not "directly comparable to the plaintiff in all material aspects" to FTBs such as

Filar. See *Bio*, 424 F.3d at 596. As a result, Filar cannot satisfy the similarly situated prong of her prima facie case.

b. Legitimate, Non-Discriminatory Reason for Filar's Displacement

Even though Filar cannot satisfy the similarly situated prong of her prima facie case, with an abundance of caution, the court will proceed with the remainder of the indirect burden shifting analysis. *See Gore*, 416 F.3d at 592; *Ballance*, 424 F.3d at 617. "An employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Rudin v. Lincoln Land Comm. Coll.*, 420 F.3d 712, 725 (7th Cir.2005) (quoting *Stockett v. Muncie Indiana Transit Sys.*, 221 F.3d 997, 1001 (7th Cir.2000)).

Here, the Board has stated that Filar was displaced from an FTB to a day-to-day substitute in the cadre due to the decline in enrollment of students in the Polish program for the 1999-2000 school year. Garvey stated that in order to reach his decision as to which teacher to displace, he reviewed each teacher's performance record, and consulted with the human resources department whether such a displacement would be proper. As a result, the Board's reason for Filar's displacement as an FTB and transfer to the cadre was due to the decline in enrollment, and

because she lacked seniority and proper certification for the open positions at the other Chicago Public Schools.

c. Pretext Argument

Lastly, after the Board has established its legitimate reason for its action, Filar is required to show that the proffered reason is pretextual. *See Stewart,* 207 F.3d at 376; *Herron v. DaimlerChrysler Corp.,* 388 F.3d 293, 301 (7th Cir.2004). "The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered." *Stewart,* 207 F.3d at 378 (quoting *Jackson v. E.J. Brach Corp.,* 176 F.3d 971, 983 (7th Cir.1999)). The court will not "sit as a superpersonnel department that reexamines an entity's business decision and reviews the propriety of the decision." *Id.* Moreover, it is not sufficient to prove that the reason was doubtful or mistaken. *Crim v. Bd. of Educ. of Cairo Sch. Dist. No. 1,* 147 F.3d 535, 541 (7th Cir.1998). Pretext does not mean simply a mistake, but instead a lie, "specifically a phony reason for some action." *Id.* (quoting *Johnson v. City of Fort Wayne,* 91 F.3d 922, 931 (7th Cir.1996)). The only concern is whether the legitimate reason provided by the employer is in fact an honest one. *See Stewart,* 207 F.3d at 378.

Filar submits no evidence to suggest that the Board's proffered reasons for her termination was phoney, dishonest, or a lie. *See Crim,* 147 F.3d at 541.

The Board has provided evidence, in the form of depositions and numbers of declining student enrollment, to justify its decision to displace Filar from an FTB to the cadre of day-to-day substitute teachers. Filar merely relies on her own personal belief that the Board removed her from the FTB list due to her age. However, the court finds this argument unpersuasive, as Danielska was 59 at the time Filar was terminated, and Alksnin was 61, while Filar was 69 years old at the time the suit was filed. Moreover, the oldest teacher on staff, Richard Lysakowski ("Lyskowski") was seven years older than Filar, yet was not displaced. In all, Filar is unable to demonstrate that the Board's legitimate, non-discriminatory reason for her displacement was based on her age, and as a result, her ADA claim must fail.

3. Filar's Accommodation Claim

The ADA provides that employers must make "reasonable accommodations" for a disabled employee's limitations, unless the employer can demonstrate that such an accommodation would impose an "undue hardship." 42 U.S.C. § 12112(b)(5)(A); *Timmons v. General Motors Corp.*, 419 F.3d 1122, 1125 (7th Cir.2006). A reasonable accommodation under the ADA includes "making existing facilities used by employees readily accessible to and usable by individuals with disabilities." *E.E.O.C. v. Sears Roebuck & Co.*, 417 F.3d 789, 803 (7th Cir.2005); § 12112(b)(5)(A). It is up to the employer to "choose a reasonable accommodation; an

employer is not required to provide the particular accommodation that an employee requests." *Id.* (quoting *Jay v. Intermet Wagner, Inc.*, 233 F.3d 1014, 1017 (7th Cir.2000)). At minimum, "the employer is obliged to provide an accommodation that effectively accommodates the disabled employee's limitations." *Id.*

In order for Filar to establish a claim for failure to accommodate, she must show that: (1) she is a qualified individual with a disability, (2) the employer was aware of her disability; and (3) the employer failed to reasonably accommodate the disability. *Id.* With respect to the third element, "the 'ADA requires that employer and employee engage in an interactive process to determine a reasonable accommodation."' *Id.*

Here, Filar requested that she be assigned to a school with a minimum walking distance to public transportation. However, the ADA does not require that an employer furnish an employee with means of transportation to and from work, nor place an employee at a job location near public transportation. "With respect to the major life activity of working, the term substantially limits means significantly restricting the ability to perform either a class of jobs or a broad range of jobs. . . ." 29 C.F.R. § 1630.2(o)(1)(ii). Therefore, activities that fall outside the scope of employment, such as commuting to and from a job location is outside the responsibility of an employer under the ADA.

The court "ordinarily looks first to whether there is a genuine issue of material fact regarding the availability of a reasonable accommodation, and if it is clear that no reasonable accommodation was available, we stop there." *E.E.O.C.*, 417 F.3d at 805 (citing *Ozlowski v. Henderson*, 237 F.3d 837, 840 (7th Cir.2001)). Here, Filar specifically requested that she be placed at a school close to public transportation because of her hip condition. Nowhere in her complaint does she allege that this hip condition substantially prohibits her from conducting her job as a teacher. Filar therefore, cannot be classified as a "qualified individual" who, "with or without reasonable accommodation, can perform the essential functions of the employment position." § 1211(8). Filar's proximity to public transportation does not effect the way in which she teaches Polish in her capacity as a substitute teacher. As a result, no genuine issue of material fact exists "regarding the availability of an accommodation" for Filar. *See E.E.O.C.*, 417 at 797.

4. Filar's Retaliation Claim

Lastly, Filar claims that the Board retaliated against her after Filar filed her grievance with the School Board. In order to establish a prima facie case, for retaliatory discharge, the plaintiff must show that: (1) she engaged in protected conduct; (2) was subject to adverse employment action; (3) she was performing her job satisfactorily; and (4) no similarly situated employee who did not engage in the

protected activity was subject to an adverse employment action. *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir.2004) (quoting *Rogers v. City of Chi.*, 320 F.3d 748, 754-55 (7th Cir.2003)); *see Hudson v. Chi. Transit Auth.*, 375 F.3d 552, 560 (7th Cir.2004) (quoting *Stone*, 281 F.3d at 644); *see also McDonnell Douglas Corp.*, 411 U.S. at 802. Failure to satisfy any one element of the prima facie case is fatal to an employee's retaliation claim. *Hudson*, 375 F.3d at 560 (citing *Hilt-Dyson v. City of Chic.*, 282 F.3d 456, 465 (7th Cir.2002)).

If the defendant presents evidence of a legitimate, non-discriminatory reason for the adverse employment action, then the defendant is entitled to summary judgment. *Stone v. City of Indianapolis*, 281 F.3d 640, 644 (7th Cir.2002). A claim of retaliation under the ADA is assessed "in the same manner that we would evaluate a claim of retaliation under other employment statute, such as Title VII." *Buie*, 366 F.3d at 503.

It is undisputed that Filar engaged in protected conduct, had performed her job satisfactorily, and that she was subjected to an adverse employment action. However, just as in her substantive ADA claim, Filar is unable to establish that similarly situated employees were treated more favorably than herself. It has been established that Filar cannot point to any other FTB teachers who are directly comparable to her in every respective way, nor can she show that any similarly situated teacher was treated more favorably than herself. As a result, Filar

cannot establish a prima facie of retaliation under the indirect, burden-shifting method.

However, with an abundance of caution, the court will analyze the remainder of Filar's retaliation claim. Assuming, arguendo, that Filar has established a prima facie case, the burden now shifts to the Board to articulate a legitimate, non-discriminatory reason for the termination. *See Moser,* 406 F.3d at 904. The Board has stated that it fired Filar as a result of decline in students at Foreman, and Filar's lack of certification to teach in other areas. Filar, on the other hand, offers no evidence to create a genuine issue of material fact as to this claim. *See* Supra, Sec. B(1).

Lastly, the burden shifts back to Filar to demonstrate that the Board's explanation is pretextual. *See Dunn,* 260 F.3d at 784. However, Filar is unable to proffer any evidence that creates a genuine issue of material fact as to whether the Board's reason was "an honest one." *See Stewart,* 207 F.3d at 378. Absent any such evidence, Filar cannot satisfy this part of the indirect burden-shifting analysis, and summary judgment is proper as to the Board on Filar's retaliation claim.

III. CONCLUSION

For the foregoing reasons, the court grants Defendant's Motion for Summary Judgment. IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VALERIE T. FILAR,	)	
Plaintiff,	)	
vs.	)	04 C 4679
CHICAGO SCHOOL REFORM BOARD OF TRUSTEES, a/k/a BOARD OF EDUCATION OF THE CITY OF CHICAGO,	)	Chicago, Illinois May 5, 2009 11:45 a.m.
Defendant.	)	

VOLUME 1
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
CHARLES R. NORGLE, SR. AND A JURY

APPEARANCES:

For the Plaintiff:

SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
BY: MR. RICHARD T. MC CAULLEY
MS. ALLISON L. MILLER
MS. RACHEL FLEISCHER

For the Defendant:

CHICAGO BOARD OF EDUCATION,
LAW DEPARTMENT
126 South Clark Street
Suite 700
Chicago, Illinois 60603
BY: MS. LINDA K. HOGAN
MS. JENNIFER Y. WU

Court Reporter:
MAELLEN E. PITTMAN, RDR, FCRR
Official Court Reporter
219 South Dearborn Street
Room 2342
Chicago, Illinois 60604
(312) 435-5576

* * *

[10] reference to counsel as appointed. Mr. McCaulley has agreed that he will not refer to himself in that way. So I think that that point is moot as well

THE COURT: I don't even know why such an issue was raised. What attorney or what law firm would do that intentionally?

MS. HOGAN: I wasn't making an accusation. I just simply thought that maybe one of the witnesses in the case might accidentally say something like that.

THE COURT: Well, it is so off the wall that it shouldn't even be raised. I don't expect that any attorney would do that or make a reference in a criminal case that the public defender is represented. So it's a nonissue.

What is the next one?

MS. HOGAN: The next issue is our motion to bar evidence of a 1993 displacement and grievance that Miss Filar filed and that was actually six years prior to the displacement that occurred. "Displacement" means just basically being shut out of your job

at the high school and you move into a substitute pool. It's not a firing. This happened to her in 1993 as well at Foreman High School. It is not related to this instance. There is no evidence of age discrimination. It was a contractual issue. The board – Dr. Garvey and the union disputed it and the board ruled in Miss Filar's favor.

THE COURT: Did the plaintiff intend to get into [11] that, the 1993 displacement and grievance issue?

MR. MC CAULLEY: Yes, your Honor.

THE COURT: What is the date of the ultimate termination or displacement in this case?

MS. HOGAN: September 19th, 1999.

THE COURT: So this event occurred six years before that time?

MS. HOGAN: That's correct.

MR. MC CAULLEY: Your Honor, it is, however, related to the events that led up to the termination in 1999.

In the 1993 school year Dr. Garvey displaced Miss Filar saying that he didn't have any position for her. Later in the spring, after she filed a grievance, the board ultimately determined that Dr. Garvey did have a position open and filled it with one of the comparators in the 1999 case. So it is part of what the plaintiff will offer as a pattern or related pattern. And the fact that this teacher was appointed or put in as

an FIB to replace the plaintiff in that time frame and was much, much younger, some 25 years younger, is highly relevant to the case and we do intend to –

THE COURT: As I see it that would be a case within a case to determine those issues as to 1999. It would be almost like a trial dealing with the 1993 matters, lifting that mini trial, so to speak, into this case filed in 2004. It is also remote. It is, at least according to your statements here, [12] about six years earlier.

And so the probative value is substantially outweighed by the danger of unfair prejudice, the confusion of the issues, calling of additional witnesses, additional presentation of documents and related matters, but summarily it would be a mini trial on what occurred in 1993.

So it is – if it may be relevant in terms of Rule 401 and 402, in the exercise of my discretion with the application of Rule 403, I would exclude the evidence of the so-called 1993 displacement and grievance issue.

MS. HOGAN: Thank you.

THE COURT: As to the next.

MS. HOGAN: And the final issue is defendant's motion to bar evidence of other administrators' evaluations of any witness in this case or any person that's mentioned in this case. And that's relevant because Miss Filar intends to introduce documents that

were evaluations made by an assistant principal at Foreman sometime in the 1990's of her. And I think –

THE COURT: Well, when you say 1990's is that going back to 1993 again?

MS. HOGAN: No, this is 1995, I believe.

The point being, your, Honor, that this was – Dr. Garvey was the one who recommended her for displacement, it was not the assistant principal. It's Dr. Garvey's evaluation

* * *

Wu – Opening

[127] here. Doctor – in fact, you will hear from the plaintiff and she will tell you that Dr. Garvey never said anything to her about her age. In fact, the evidence will show that Dr. Garvey hired Miss Filar when she was 62 years old. Miss Filar only had a few months of substitute teaching experience at the time and teaching was her second career.

Dr. Garvey was 60 years old when Miss Filar was displaced. Dr. Garvey will tell you about all of the teachers on staff at Foreman and they were of all ages. And there was a teacher in his 70s. You will hear about this teacher. His name is Richard Lysakowski. Mr. Lysakowski was a bilingual teacher at Foreman whom Dr. Garvey consistently rated as a superior teacher and whom Dr. Garvey promoted at age 66.

You will also hear about another teacher by the name of Helena Danelska. She was a math teacher at Foreman. Dr. Garvey hired and consistently rated her as a superior teacher. Dr. Garvey promoted her when she was 58 years old.

You will also hear about another teacher at Foreman by the name of Les Jedlinski, the physical education teacher at Foreman. Dr. Garvey hired him and promoted him when Mr. Jedlinski was 54 years old. Dr. Garvey also consistently rated Mr. Jedlinski as a superior teacher.

Dr. Garvey will tell you that what mattered the most to him was whether his teachers could effectively do their jobs serving the best interests of the students.

* * *

Hogan – closing

[592] Let's start with Miss Filar. Well, first the most obvious point is that Dr. Garvey hired Miss Filar in 1992 at age 62 – I'm sorry – yeah, 1992 – too many dates in this case – at age 62.

He hired her after an in-person interview.

It doesn't make sense to say that someone who would hire a woman who was age 62 would suddenly, in 1999, turn around and become discriminatory based on age; would suddenly develop an age bias within seven years. That doesn't make sense.

And you will be instructed when you go back to the jury room to deliberate, you'll get a set of instructions, one of those instructions will tell you that you must use common sense in making your decision. You must use common sense. And I would ask you to apply that to this situation.

Importantly, Dr. Garvey also gave the plaintiff the benefit of the doubt, and treated her well on more than one occasion that we heard about. The first time would be when he hired her as a brand new teacher. He gave her the benefit of the doubt in that situation.

Second time was when he gave her "superiors" at the end of her time at Foreman. I'll talk about that more specifically in a minute. But I want you to think about whether it makes sense to say whether someone who gives Miss Filar "superiors" is discriminating against her because of her

* * *

[606] As I told you, the plaintiff, Miss Filar, has the burden of proof in this case. It is not defendant's job to disapprove her case, to prove our case. It is her job to prove her case.

And that means, from the defendant's point of view, that the plaintiff has to prove the facts that comprise her case so that they are more probably true than not.

In this case the plaintiff points to the fact that Dr. Garvey hired and promoted some younger

teachers, and the defendant points to the fact that Dr. Garvey hired and promoted some older teachers.

Okay. Say that makes it 50/50, hypothetically.

When you add the fact that Dr. Garvey hired Miss Filar at age 62, and that he was 60 himself when she was displaced, that tips the scale in defendant's favor.

But more importantly, what you need to realize is if for some reason you are stuck at 50/50, if you think plaintiff's case is just as plausible as defendant's story, know what happens in that situation, if you are dead-even, you have to find for the defendant.

And why is that? As the instructions tell you, the plaintiff has to tip the scale in her favor, and if you think it's 50/50 she hasn't done that, she hasn't met her burden, and you'd have to find for the defendant.

So I have shown you, I hope, that Dr. Garvey treated

* * *